No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and

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[1] Counsel of record for petitioner and respondents consented to the filing of this brief by filing blanket consents with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Many of the Chamber's members are landowners whose private property may be saddled with additional and unreasonable regulatory burdens under the Endangered Species Act ("ESA") if the "critical habitat" designation authority asserted by the United States Fish and Wildlife Service ("Service") in this case is allowed to stand. And all of the Chamber's members have an interest in reaffirming courts' duty under *Chevron*[2] to engage in independent statutory interpretation, thus ensuring administrative agencies do not impose regulatory burdens that exceed lawful bounds.

SUMMARY OF ARGUMENT

The opinion below is emblematic of judicial decisions that disregard this Court's repeated insistence that *Chevron* requires courts to take seriously the statutory limits on agencies' authority and apply them rigorously in all cases. For deference under *Chevron* to be consistent with the legislative power to make law, the judicial duty to "say what the law is,"[3] and the executive obligation to faithfully execute it, the courts must exhaust the traditional tools of statutory construction to inquire whether the text of the statute written by Congress answers the question presented. Applying *Chevron* deference without first undertaking this intensive investigation violates fundamental principles of separation of powers.

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[2] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring judicial deference to certain executive agency statutory interpretations).

[3] See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The claim to sweeping agency power uncritically accepted by the court of appeals allows the Service to burden private property across the country with costly ESA regulation virtually at will. Even worse, the lower court's fundamental misapplication of *Chevron* in this case reinforces a disturbing trend among lower courts to take a "hands off" approach to *Chevron* analysis. This Court should remind federal courts that they are required to employ rigorous methods of statutory interpretation before invoking ambiguity or bureaucratic expertise as a reason to cede discretion to federal agencies.

ARGUMENT

I. FEDERAL COURTS MUST CONDUCT A RIGOROUS TEXTUAL ANALYSIS WHEN REVIEWING AGENCY ACTION UNDER THE *CHEVRON* FRAMEWORK

This dispute turns on the meaning of the term "critical habitat" in 16 U.S.C. § 1533(a)(3)(A)(i). In particular, the ESA provides that the Service "to the maximum extent prudent and determinable * * * shall * * * designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i).

Without first considering whether "Congress's meaning" was "discern[able]" with the aid of "the traditional tools of statutory construction," *SAS Institute Inc.* v. *Iancu*, No. 16-969, slip op. at 11-12 (U.S. Apr. 24, 2018) (quoting *Chevron*, 467 U.S. at 843 n.9), the court of appeals deferred under *Chevron* to the Service's interpretation, which stretches "critical habitat" to include private land that is not "habitat" at all, much less *critical* habitat. This resulted in upholding the Service's designation as "critical habitat" land that all parties agreed the endangered species cannot possibly inhabit. See Pet. App. 138a (Jones, J., dissenting from denial of rehearing en banc) ("The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute."). In doing so, the Fifth Circuit ignored this

Court's repeated insistence that *Chevron* deference is appropriate *only* when the court has determined—after exhausting the traditional tools of statutory construction—that the text of the statute does not resolve the question at issue. This Court should reverse the decision below and reinforce that *Chevron* demands searching textual analysis from courts before any deference is shown to an agency's statutory interpretation.

A. *Chevron* requires careful analysis of the statutory text before deference is given

1. It is well established that "an administrative agency's power to promulgate legislative regulations" is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If the court determines that Congress has spoken clearly on the disputed question, then "that is the end of the matter," *Chevron*, 467 U.S. at 842. The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.* at 842-844. Only "if the statute is silent or ambiguous with respect to the specific issue," does the Court move on to ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. This is no mere speed bump: a court may defer to the agency's interpretation only if it first "find[s] [it]sel[f] unable to discern Congress's meaning" "after 'employing traditional tools of statutory construction.'" *SAS Institute*, slip op. at 11-12 (quoting *Chevron*, 467 U.S. at 843 n.9).

Robust enforcement of *Chevron* safeguards the separation of powers by ensuring that courts—not agencies—say what the law is. The judicial duty—and the Administrative Procedure Act's charge that courts resolve "all relevant questions of law," 5 U.S.C. § 706—demand that courts exhaust the traditional tools of construction in every case where statutory interpretation is required. At the very least, that duty requires careful investigation of

the ordinary meaning of the words of the statute and rigorous analysis of the statute as a whole, not a single provision viewed in isolation. See *Carcieri* v. *Salazar*, 555 U.S. 379, 387-389 (2009) (reversing lower court's application of deference that failed to analyze "the ordinary meaning" of the text and "the natural reading of the [provision in question] within the context of the [statute]").

2. When reviewing agency interpretations of allegedly ambiguous statutory provisions, this Court often ends the *Chevron* analysis at the outset. Indeed, in recent Terms, this Court has repeatedly rejected requests for deference to an administrative interpretation because the text of the statute resolves the question at issue. See, *e.g.*, *SAS Institute*, slip op. at 12 (rejecting plea for deference to purportedly ambiguous statute because "after applying traditional tools of interpretation," the Court's "duty [wa]s to give effect to the [statutory] text"); *Digital Realty Trust, Inc.* v. *Somers*, No. 16-1276, slip op. at 18-19 (Feb. 21, 2018) ("Because Congress has directly spoken to the precise question at issue, we do not accord deference [under *Chevron*] to the contrary view advanced by the SEC['s]" regulation."); *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Coventry Health Care* v. *Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule."); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1979 (2016) ("Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."); *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 n.5 (2016) ("Be-

cause we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*.").[4] In most of these instances, the Court reversed a lower-court decision because that court failed to rigorously construe the statute before applying deferential review to the agency's regulation.

The court below, in upholding the Service's designation of Unit 1 as "unoccupied critical habitat" based on deference to the Service, similarly skated past the textual analysis required by *Chevron*. Without first attempting to "discern Congress's meaning" by exhausting "traditional tools of interpretation," *SAS Institute*, slip op. at 11-12, or even identifying any ambiguity in the term "critical habitat," the Fifth Circuit deferred to the Service's sweeping and unprecedented interpretation of that term to include *non*-habitat, see Pet. App. 23a. The lower court's approval of an agency's statutory interpretation that defies both common sense and ordinary English usage is emblematic of recent lower-court decisions that ignore statutory text in contravention of the *Chevron* framework. Had the court of appeals undertaken the required analysis, the statute's text would have resolved the issue—as it has in so many of this Court's recent decisions—without the need for *Chevron* deference.

3. While this Court has led by example in applying robust textual analysis before turning to executive regulations, there is evidence that lower courts follow in these

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[4] See also *Hawkins* v. *Cmnty. Bank of Raymore*, 761 F.3d 937, 941-942 (8th Cir. 2014) (rejecting agency interpretation as violative of statutory text and describing contrary opinion of the Sixth Circuit as "manufactur[ing] ambiguity" that did not exist), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).

footsteps inconsistently at best. Empirical studies reveal that lower courts apply a far stronger dose of deference under *Chevron* than does this Court. Barnett & Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 6 (2017). Scholars have thus perceived a difference between the "*Chevron* Supreme" on offer in this Court and the "*Chevron* Regular" retailed by the lower courts. *Ibid.*

Much of the recent criticism leveled at *Chevron* doctrine may stem from courts' eagerness to resort to deference without expending judicial efforts to interpret statutes by employing all available tools. Courts' seeming readiness to declare statutory ambiguity and resort to a tidy, agency-proffered solution, rather than diving headlong into the muck and mire of statutory construction, is understandable. But it strains our system of separated powers. If *Chevron* is to be consistent with the Constitution, judges must be freed—in fact, duty-bound—to exercise the entire scope of Article III interpretive powers before deferring to an executive agency.

The time may be ripe for this Court to provide explicit—rather than merely exemplary—guidance along these lines. This brief discusses some of the relevant *Chevron*-threshold principles that are scattered throughout this Court's precedents. And judges and scholars have proposed more systematic doctrinal clarifications for this Court's consideration. See, *e.g.*, *id.* at 72 (proposing that the Court provide guidance on "what are the 'traditional tools of statutory construction' to which *Chevron* referred" and whether there is "an 'order of battle' in which the circuit courts proceed through certain steps or interpretive canons to interpret statutes"); Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2121 (2016) (arguing for "reduc[ing] the number of canons of construction that depend on an initial finding of ambiguity"—such as *Chevron*—in favor of courts' "seek[ing] the best reading

of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons"); *id.* at 2154 (arguing that "in cases where an agency is * * * interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text," rather than making "ambiguity" a trigger for agency deference). Further instructions from this Court may ensure that *Chevron* is consistent with the constitutional design.

B. Properly applying *Chevron* would have required rejecting the Service's interpretation

As Judge Jones's dissent from denial of rehearing en banc recognized, "the panel * * * neglected" "to undertake holistic statutory interpretation." Pet. App. 131a-132a. Instead, its analysis focused exclusively on the statute's definitional provision. Because that provision—viewed in a vacuum—does not "appear to require that a species actually be able to inhabit its 'unoccupied critical habitat,'" the court of appeals concluded that the Act does not contain a habitability requirement. *Id.* at 131a. As Judge Jones explained, however, that conclusion is incorrect. *Id.* at 131a-135a.

The ESA states that the Service

> shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat * * * and * * * may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)-(ii). The meaning of this provision dictates that whatever is "critical habitat" must first be "any habitat of such species." The fact that the separate statutory definition of "critical habitat" includes both

areas occupied by the species and areas unoccupied by the species does not alter the fact that all such areas must be within the "habitat of such species"—*i.e.*, they must at least be capable of habitation by that species. The majority below did not even confront this ordinary-meaning roadblock, which stems from the very provision that empowers the Service to designate "critical habitat" in the first place. It instead peremptorily reasoned that Congress had delegated broad authority to the Service and thus proceeded to apply *Chevron* deference. Pet. App. 15a-16a.

The lower court's interpretation also overlooks the ordinary meaning of the word "habitat" itself, which is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). See also The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"). Applying that ordinary meaning here, Unit 1 cannot be "habitat" because the dusky gopher frog does not—and indeed could not—"naturally live[] and grow[]" there. Pet. App. 23a-24a. And because Unit 1 cannot be habitat, it obviously cannot be *critical* habitat. Pet. App. 60a (Owen, J., dissenting) ("An area cannot be essential for use as habitat if it is uninhabitable.") (quotation marks omitted). This Court has rejected similar agency attempts to stretch statutory terms beyond their ordinary meaning. See, *e.g.*, *Freeman* v. *Quicken Loans*, 132 S. Ct. 2034, 2041-2042 (2012) (rejecting agency's bid for deference because "it is normal usage that, in the absence of contrary indication, governs our interpretation of texts").

The court of appeals' conclusion that the ESA contains no habitability requirement demonstrates the problems that arise when courts fail to apply the rigorous textual

analysis required by *Chevron*. The court of appeals deferred to the Service's wrongheaded interpretation of the ESA without even pausing to ask whether any genuine statutory ambiguity justified doing so. By breezing past that essential question, the court of appeals ignored the plain meaning of the word "habitat" and the essential limit Congress placed on the Service's discretion by using that term consistently throughout the statutory scheme. See *id.* at 2044 (holding that there is no "warrant for expanding [a statutory provision] beyond the field to which it is unambiguously limited").

Instead of paying attention to the words Congress used to cabin the agency's discretion, the court of appeals mistakenly focused on the Service's expertise and the various scientific findings allegedly justifying its conclusion that Unit 1 is "essential to the conservation" of the frog. See Pet App. 162a (Jones, J.) ("The panel majority's nontextual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats."). But no amount of subject-matter expertise can give an agency license to rewrite the terms of a statute. See *Chevron*, 467 U.S. at 842-843 & n.9 (If, by "employing traditional tools of statutory construction," the court determines that Congress' intent is clear, "that is the end of the matter."); *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445-2446 (rejecting EPA's "rewriting of the statutory thresholds" and "reaffirm[ing] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate"). Scientific skill does not give birth to interpretative authority. No matter how much technical analysis supported the Service's conclusion that Unit 1 is "essential to the conservation" of the frog, if Unit 1 is not "habitat," the Service lacks authority to designate it as "critical habitat."

Nor does the fact that *other* aspects of the ESA might be ambiguous change the analysis. The court of appeals apparently assumed that the phrase "essential to the conservation of the species" is ambiguous. Even if that were so, it is irrelevant because only *habitat* "essential to the conservation of the species" is eligible for designation, and Unit 1 cannot be habitat. The lower court's error—ignoring a textual limitation on agency power in the name of deference triggered by a secondary textual ambiguity—is symptomatic of a broader misapplication of *Chevron* that has been the subject of close attention by this Court in recent years. See, *e.g.*, *Kingdomware Techs.*, 136 S. Ct. at 1978 (rejecting lower court's reliance on statute's "prefatory clause" to "change the scope of the [statute's] operative clause"); *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009) ("[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute]").

This case provides a much-needed opportunity for the Court to further clarify the proper approach to statutory interpretation under the *Chevron* framework.

II. THE FIFTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S TEACHING THAT A VIGOROUS APPLICATION OF *CHEVRON*'S REASONABLENESS TEST IS AN ESSENTIAL PROTECTION AGAINST ULTRA VIRES AGENCY ACTION

The lower court's fundamental misapplication of *Chevron*'s reasonableness analysis further underscores the need for this Court to refine the second step of the *Chevron* rubric.

This Court has emphasized that "[e]ven under [*Chevron*']s deferential standard, * * * 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015). Thus, "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive

gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* at 2708. Put another way, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013).

The Court enforced this boundary in *AT&T Corp.* v. *Iowa Utilities Board*, holding an agency interpretation unreasonable because it was "not in accord with the ordinary and fair meaning" of the statutory terms. 525 U.S. 366, 389-390 (1999). Likewise, in *Department of Treasury* v. *FLRA*, this Court set aside the Department's interpretation as "not reasonable" because it was "flatly contradicted by the language" and the "plain text" of the statute. 494 U.S. 922, 928 (1990).

As Judge Silberman put it: "Much of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global Tel*Link* v. *FCC*, 859 F.3d 39, 59 (D.C. Cir. 2017) (Silberman, J., concurring). This case presents yet another example of "those kinds of agency tactics." *Ibid.*

Even assuming the relevant statutory terms are ambiguous, the interpretation embraced by the opinion below leads to absurd results that run afoul of *Chevron*'s litmus test of reasonable interpretation. As Judge Jones explained:

> Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must

> contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.
>
> According to the panel majority, however, Unit 1 is "critical habitat" despite being unoccupied by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land.

Pet. App. 143a.

That bizarre arrangement is at odds with uniform precedent interpreting the ESA, the statute's purpose, and its legislative history, all of which demonstrate that an unoccupied critical habitat designation was "intended to be *different* from and *more demanding* than an occupied critical habitat designation." *Id.* at 149a; see *id.* at 145a-150a. But because the court of appeals rendered *Chevron* a mere speed bump, it disregarded the relevant interpretive evidence and accepted a construction that makes it easier to designate as critical habitat land on which the species cannot survive (like Unit 1) than land which is occupied by the species. That approach to *Chevron* ignores this Court's repeated holdings that the framework should be applied rigorously to discipline unreasonable agency in-

terpretations—even those eligible for deference—to prevent blatant executive overreach. Pet. App. 49a (Owen, J., dissenting) ("The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government.").

Judge Owen's dissent further highlights the impermissibility of the Service's (and the panel majority's) interpretation. As she explained, that interpretation "depends entirely on adding words to the Act that are not there." Pet. App. 63a. Specifically, the "linchpin to the majority's holding" is that the Service must have "unfettered discretion to designate land as 'critical habitat' so long as * * * at least one physical or biological feature[ ] * * * essential to the conservation of the species' [is] present" on the land. *Id.* at 63a-64a (quotation marks omitted). By permitting "the Service to designate an area as 'critical habitat' if it has '*a critical feature*,'" the opinion below allowed the Service to "re-write[ ] the Endangered Species Act." *Id.* at 65a (emphasis in original).

The Service's interpretation exceeds the bounds of permissible interpretation and thus fails under *Chevron*. Instead of uncritically deferring to it, the court of appeals should have been "alarmed that [the Service] felt sufficiently emboldened by [this Court's *Chevron*] precedents to make the bid for deference that it did here." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. By "recogniz[ing] the authority claimed by [the Service]," the decision below "deal[t] a severe blow to the Constitution's separation of powers." *Ibid.*

III. The Decision Below Will Have Far-Reaching Implications For Landowners Across The Country

This case's importance extends beyond the core doctrines of administrative law discussed above to practical issues of ESA enforcement that affect myriad landowners across the Nation.

Limiting the Service's proper role with respect to "critical habitat" designations is vital. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quotation marks omitted). In this case alone, the agency's interpretation allowed it to impose $34 million in costs on the landowner petitioners merely because the Service found a single feature essential to the dusky gopher frog's survival on their land. Pet. App. 158a-159a. In the view of the Chamber and its many landowner members, petitioner is correct to warn that the Service's "single essential feature" rule will likely impose billions of dollars in costs on landowners across the country. Weyerhaeuser Pet. 4. As Judge Owen's dissent explained, the decision below threatens to subject large swaths of the United States to intensive federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Pet App. 49a. Even worse, under the lower court's holding, the Service's designations are largely immune from judicial review. *Id.* at 31a-34a (majority opinion); Weyerhaeuser Br. 45-56.

If the opinion below stands, the Service will be "encourage[d]" to pursue "aggressive, tenuously based interference with property rights." Pet. App. 162a (Jones, J.). Because the court of appeals—and the Service—relied on

"non-textual interpretations of the ESA" in violation of *Chevron*, this Court should reverse the decision below and enforce "Congress's efforts to prescribe limits on the designation of endangered species' habitats." *Ibid.*

CONCLUSION

The Chamber respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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